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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA
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11 HEIDI CHIAT, an individual,) 3:16-cv-00328-HDM-WGC
12)
13 Plaintiff,)
14 vs.) ORDER
15)
16 ELKO COUNTY SCHOOL DISTRICT, a)
17 governmental entity, STEVE COOK,)
18 an individual, LYNN MANNING JOHN,)
19 an individual, JEFF ZANDER, an)
20 individual, and MIKE SMITH, an)
21 individual,)
22 Defendants.
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29 Before the court is defendants Elko County School District
30 ("ECDS"), Steve Cook, Lynn Manning John, Jeff Zander, and Mike
31 Smith (collectively "defendants") motion for summary judgment (ECF
32 No. 27). Plaintiff has responded (ECF No. 30) and defendants have
33 replied (ECF No. 33) to plaintiff's response. The defendants'
34 motion is therefore ripe for judgment.

35 Plaintiff sued ECSD and four individual administrators,
36 alleging federal Constitutional and state law claims relating to
37 her First Amendment rights and protected speech. In addition to
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1 ECSD, plaintiff has named various members of ECSD and the Owyhee
2 Combined School ("OCS") including (1) OCS vice principal Lynn
3 Manning John, (2) OCS principal Steve Cook, (3) ECSD superintendent
4 Jeff Zander, and (4) ECSD deputy superintendent Mike Smith.

5 Plaintiff alleges one retaliation claim under 42 U.S.C. § 1983
6 arguing that she was subjected to an adverse employment action
7 because of her constitutionally protected speech (ECF No. 1
8 (Complaint)). Plaintiff also alleges a state law claim for
9 tortious discharge. *Id.* Defendants have moved for summary
10 judgment on both of plaintiff's claims.

11 **I. Background**

12 **A. Plaintiff's employment and licensure**

13 Plaintiff commenced the Nevada teacher license application
14 process with the Nevada Department of Education ("NDE") in
15 September 2015 in preparation for an interview for a teaching job
16 in Elko, Nevada (Def. Mot. Summ. J. Ex. 3 (Deposition of Heidi
17 Chiat)). On September 22, 2015, plaintiff was offered a contract
18 to teach fifth-grade at OCS (Def. Mot. Summ. J. Ex. 4). Plaintiff
19 accepted the employment offer in a letter received by ECSD on
20 September 30, 2015 (Def. Mot. Summ. J. Ex. 5).

21 The September 22 contract offer states that it was made
22 "pending receipt of a copy of your certification for the state of
23 Nevada and receipt of official transcripts in [the ECSD
24 superintendent's] office . . . final approval by the Board of
25 Trustees." (Def. Mot. Summ. J. Ex. 4). On October 28, 2015,
26 plaintiff was advised by the NDE in an email that:

27 Your application for an initial K-8 Elementary license has
28 been evaluated and does not currently meet the minimum
requirements. The license you applied for is a core

1 teaching area and the requirements below must be met before
2 a license may be issued: Praxis II Elementary. . . . You do
3 not have a valid [Nevada] educator license until these
4 steps are taken and you receive confirmation that the
5 license has been issued. Your non-refundable fee and
6 application are valid through November 29, 2015. If you do
7 not provide the required information prior to that date you
8 will need to submit a new application, new fingerprint card
9 and new application fee.
10 (Def. Mot. Summ. J. Ex. 6).

11 On March 18, 2016, defendant Smith notified plaintiff by
12 letter that her conditional employment with ECSD would be
13 terminated. In that letter, quoting NRS 391.120(3), defendant
14 Smith stated "it is unlawful for the board of trustees of any
15 school district to employ any teacher who is not legally qualified
16 to teach all the grades which the teacher is engaged to teach."
17 (Def. Mot. Summ. J. Ex. 12). NRS 391.120(3) further provides that
18 "the board of trustees shall suspend or terminate, as applicable,
19 the employment of any teacher who fails to maintain a license." At
20 the time of her termination, plaintiff had failed to meet the
21 minimum requirements to be licensed as a teacher in Nevada and no
22 license had been issued to the plaintiff by the state of Nevada.

23 **B. Alleged protected speech and adverse employment action**

24 In her complaint, plaintiff claims that "[p]rior to a negative
25 evaluation received by Plaintiff on February 29, 2016, Plaintiff
26 had complained up her chain of command regarding efforts by
27 Defendant John and her family members to harass Plaintiff regarding
28 her discipline and grading of students." (Complaint). Plaintiff
further claims that her complaints "alleged favoritism by John of
students that were related to John by blood." *Id.* Plaintiff
asserts that her complaints of favoritism and harassment constitute
protected speech.

1 Plaintiff also claims that she engaged in protected speech
2 when she reported to defendants Cook and Zander, the Federal Bureau
3 of Investigation, and the Bureau of Indian Affairs rumors that "an
4 underage student was having an affair with a teacher at" OCS
5 (Complaint).

6 Plaintiff alleges she suffered adverse employment actions in
7 the form of a negative evaluation and termination as a result of
8 her protected speech in violation of 42 U.S.C. § 1983 and Nevada
9 state law.

10 **II. Legal standard**

11 Summary judgment shall be granted "if the movant shows that
12 there is no genuine issue as to any material fact and the movant is
13 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
14 The burden of demonstrating the absence of a genuine issue of
15 material fact lies with the moving party, and for this purpose, the
16 material lodged by the moving party must be viewed in the light
17 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*
18 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141
19 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one
20 that affects the outcome of the litigation and requires a trial to
21 resolve the differing versions of the truth. *Lynn v. Sheet Metal*
22 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*
23 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

24 Once the moving party presents evidence that would call for
25 judgment as a matter of law at trial if left uncontroverted, the
26 respondent must show by specific facts the existence of a genuine
27 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
28 250 (1986). "[T]here is no issue for trial unless there is

1 sufficient evidence favoring the nonmoving party for a jury to
2 return a verdict for that party. If the evidence is merely
3 colorable, or is not significantly probative, summary judgment may
4 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla
5 of evidence will not do, for a jury is permitted to draw only those
6 inferences of which the evidence is reasonably susceptible; it may
7 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
8 F.2d 946, 952 (9th Cir. 1978).

9 **III. Analysis**

10 **A. Section 1983 First Amendment retaliation**

11 "[T]he First Amendment protects a public employee's right, in
12 certain circumstances, to speak as a citizen addressing matters of
13 public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126
14 S.Ct. 1951, 164 L.Ed.2d 689 (2006). However, "while the First
15 Amendment invests public employees with certain rights, it does not
16 empower to 'constitutionalize the employee grievance.'" *Id.* at 420,
17 126 S.Ct. 1951 (quoting *Connick v. Myers*, 461 U.S. 138, 154, 103
18 S.Ct. 1684, 75 L.Ed.2d 708 (1983)).

19 In *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), the Ninth
20 Circuit articulated a five-factor test for evaluating First
21 Amendment Retaliation claims. Initially the claimant "bears the
22 burden of proof at trial of showing (1) that she spoke on a matter
23 of public concern; (2) that she spoke as a private citizen rather
24 than a public employee; and (3) that the relevant speech was 'a
25 substantial or motivating factor in the adverse employment
26 action.'" *Coomes v. Edmonds School Dist. No. 15*, 816 F.3d 1255,
27 1259 (9th Cir. 2016) (quoting *Eng*, 552 F.3d at 170-71). If the
28 plaintiff satisfies the first three *Eng* factors, "the burden of

1 proof shifts to the government to show that (4) 'the state had an
2 adequate justification for treating the employee differently from
3 other members of the general public'; or (5) 'the state would have
4 taken the adverse employment action even absent the protected
5 speech.'" *Id.* (quoting *Eng*, 552 F.3d at 170-72).

6 *Eng's* factors must be met in order for a plaintiff to succeed
7 on her claim and "a reviewing court is free to address a
8 potentially dispositive factor first rather than addressing each
9 factor sequentially." *Id.* at 1260. As such, the court will focus
10 on the second, fourth, and fifth *Eng* factors.

11 For purposes of First Amendment protection, the "critical
12 question . . . is whether the speech at issue is itself ordinarily
13 within the scope of an employee's duties, not whether it merely
14 concerns those duties." *Lane v. Franks*, --U.S.--, 134 S.Ct. 2369,
15 2379, 189 L.Ed.2d 312 (2014). "Thus, to the extent that
16 [plaintiff's] speech was within the scope of her employment duties,
17 such speech is not protected by the First Amendment." *Coomes*, 816
18 F.3d at 1260.

19 Whether plaintiff spoke as a private citizen or a public
20 employee is a mixed question of fact and law. *Id.* Plaintiff's job
21 responsibilities as a teacher at OCS is a question of fact and the
22 constitutional implication of those facts is a question of law.
23 *Id.* "If [plaintiff's] speech owes its existence to [her] position
24 as a teacher, [she] spoke as a public employee, not as a citizen."
25 *Id.* (internal quotation marks omitted) (second and third alteration
26 in original).

1 **1. Speech regarding inappropriate teacher and student**
2 **relationship**

3 Plaintiff claims that she was retaliated against because she
4 reported rumors of a sexual relationship between a student and a
5 teacher at OCS. Defendants contend that plaintiff spoke regarding
6 the inappropriate relationship as a public employee and such speech
7 is thus unprotected. In support of their argument, defendants
8 allege that, as a teacher, plaintiff is a mandatory reporter and
9 had a legal duty to report the rumors about the relationship
10 between the OCS student and teacher. Plaintiff responds that she
11 is under no obligation to report "rumors" and those rumors "d[id]
12 not trigger the basis for a belief the [student] was subjected to
13 physical, mental or sexual abuse." (Pl. Resp. Mot. Summ. J.). The
14 court finds plaintiff's argument unpersuasive.

15 NRS chapter 432B requires teachers to report neglect and
16 abuse, including sexual abuse.¹ Furthermore, the uncontested facts
17 show that plaintiff believed she had a legal obligation to report
18 the rumors of the inappropriate relationship. In fact, in her
19 email communication with defendants, plaintiff specifically
20 referred to herself as a "mandated reporter" and said she had no
21 choice but to report the rumors of the inappropriate relationship
22 (Def. Mot. Summ. J. Ex. 6). Other courts have held that reports
23 made pursuant to an obligation as a mandatory reporter are
24 unprotected under the First Amendment. See e.g. *Eugenio v. Walder*,

26 ¹NRS 432B.220(1)(a) provides that a person employed by a public
27 school "who, in his or her professional capacity, knows or has
28 reasonable cause to believe that a child has been abused or neglected
shall . . . report the abuse or neglect of the child to an agency
which provides child welfare services or to a law enforcement agency."

1 No. 06-CV-4928 (CS) (GAY), 2009 WL 1904526, at *9 (S.D.N.Y. July 2,
2 2009) ("Plaintiffs' reports of suspected abuse to CPS are not
3 constitutionally protected speech because Plaintiffs made those
4 reports pursuant to their official duties and not as private
5 citizens.")

6 Therefore, the court concludes that the undisputed facts
7 establish that plaintiff spoke as a public employee and not as a
8 private citizen when she reported an alleged inappropriate sexual
9 relationship between the OCS student and a teacher. Thus,
10 plaintiff's speech is not protected under the First Amendment.

11 **2. Speech regarding alleged favoritism and harassment**

12 Plaintiff claims that "prior to a negative evaluation in
13 February 2016, Plaintiff jumped her chain of command regarding
14 efforts by Defendant John to harass Plaintiff regarding her grading
15 of students" and alleges that "[t]hese complaints alleged
16 favoritism by John of Shoshone students who were related to John by
17 blood over students not so related and/or of Paiute descent." (Pl.
18 Resp. Mot. Summ. J.). Plaintiff argues that her "expressive
19 activity took place away from her students and away from her
20 classroom" and "therefore did not owe its existence to her job as a
21 teacher." *Id.*

22 Defendants argue that plaintiff's speech was made pursuant to
23 her job duties as a teacher and thus the speech owes its existence
24 to plaintiff's public employment. In support of their argument,
25 defendants point to various "Performance Responsibilities" that
26 were part of the job posting for the position plaintiff was
27 eventually hired to fill (Def. Mot. Summ. J. Ex. 15). According to
28 the performance responsibilities, plaintiff was required to

1 maintain open lines of communication between students and parents,
2 cooperate with other ECSD staff members, establish and maintain
3 cooperative relations with others, maintain accurate, complete, and
4 correct records, and assist the administration in upholding and
5 enforcing rules, regulations, and policy. *Id.*

6 Plaintiff's communication to defendants on these issues
7 relating to favoritism of members of the school and regarding her
8 discipline and grading of students was within the scope of
9 plaintiff's responsibilities as an educator and therefore was not
10 made as a private citizen. See *Dorcely v. Wyandanch Union Free*
11 *School Dist.*, 665 F.Supp.2d 178, 208-09 (E.D.N.Y.2009) ("Public
12 employees who convey complaints or grievances about a matter
13 pertaining to their official duties to their supervisors do so in
14 their capacities as employees rather than citizens, even when the
15 subject matter of their speech touches upon a matter of public
16 concern, and therefore, such speech is not protected by the First
17 Amendment.") (internal quotation marks and alteration omitted).

18 Because the undisputed facts establish that plaintiff's speech
19 on the issue of alleged harassment, favoritism, discipline, and
20 grading, was made as a public employee, rather than a private
21 citizen, defendants are entitled to summary judgment on plaintiff's
22 first claim for relief.

23 **3. Fourth and fifth *Eng* factors**

24 Finally, the court concludes that even if the plaintiff had
25 presented sufficient evidence establishing triable issues of fact
26 on her First Amendment claim that she spoke as a private citizen,
27 the defendant has presented evidence that "the state had an
28 adequate justification for treating the employee differently from

1 other members of the general public"; and "the state would have
2 taken the adverse employment action even absent the protected
3 speech." *Eng*, 552 F.3d at 170-72.

4 The parties do not dispute that plaintiff was not licensed as
5 a teacher by the state of Nevada. The parties also do not dispute
6 that ECSD explicitly made clear in its contract offer that
7 plaintiff's continued employment was contingent upon plaintiff
8 becoming a licensed teacher in Nevada. Thus, even if plaintiff had
9 met her burden and satisfied the first three *Eng* factors,
10 defendants have presented sufficient evidence that they both (1)
11 had adequate justification for treating plaintiff differently from
12 other members of the public, and (2) would have taken the adverse
13 employment action even absent plaintiff's alleged protected speech.
14 Therefore, there is no triable issue of material fact for trial and
15 defendants are entitled to summary judgment on plaintiff's First
16 Amendment claims.

17 **B. Tortious discharge**

18 Under Nevada law, "[a]n employer commits a tortious discharge
19 by terminating an employee for reasons that violate public policy."
20 *Allum v. Valley Bank of Nev.*, 970 P.2d 1062, 1064 (1998).
21 "[R]ecovery for retaliatory discharge under state law may not be
22 had upon a 'mixed motives' theory; thus, a plaintiff must
23 demonstrate that the protected conduct was the proximate cause of
24 his discharge." *Id.* at 1064 (emphasis in original). In other
25 words, the protected activity must have been the sole proximate
26 cause of the termination.

27 Here, plaintiff was informed that she was terminated because
28 she failed to obtain a Nevada teaching license. Plaintiff was also

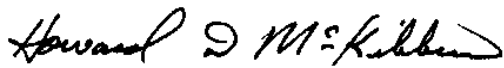
1 put on notice in her original offer from ECSD that her continued
2 employment was contingent upon obtaining a Nevada teaching license.
3 Finally, the NDE notified plaintiff that she was not in compliance
4 with Nevada teaching licensure requirements. Thus, plaintiff has
5 not shown that material issues of fact exist that would establish
6 her alleged protected speech was the proximate cause of her
7 termination and defendants are thus entitled to summary judgment on
8 plaintiff's second claim for relief.

9 **IV. Conclusion**

10 Plaintiff has not produced evidence to create a genuine issue
11 of material fact for trial in response to defendants' motion for
12 summary judgment. Accordingly, defendants' motion (ECF No. 27) is
13 **GRANTED** and judgment shall be entered in favor of defendants on all
14 of plaintiff's claims.

15 IT IS SO ORDERED.

16 DATED: This 26th day of March, 2018.

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18 UNITED STATES DISTRICT JUDGE
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